89-548 (1)

Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

October Term, 1989

NO.

NICODEAN MARK BILECKI,
EDNA MAE BILECKI,

Petitioners,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Filed September 27, 1989

QUESTIONS PRESENTED FOR REVIEW

I. Does the United States Constitution, Sixth Amendment, require that a defendant in a criminal case be entitled to a peremptory strike without a showing of prejudice?

II. Is the defendant in a criminal case entitled to a new trial where the Government failed to object to defendant's motion for new trial at the time the motion was made and granted by the court, but rather waited until after the motion was granted to file a motion for reconsideration?

LISTING OF PARTIES

The following is a list of parties to the proceeding in the Fifth Circuit Court of Appeals whose judgment is sought to be reviewed:

NICODEAN MARK BILECKI, EDNA MAE BILECKI and the UNITED STATES OF AMERICA

INDEX

	Page
Opinions Below	2
Jurisdiction Of The Court	2
Constitutional Provisions Involved	3
Statement of the Case	3
A. Procedural History	3
B. Facts	8
Argument for Granting Writ of Certiorari	10
Argument I Because of the Importance of the Sixth Amendment Right to a Fair Trial, This Court Should Decide Whether A Defendant in a Criminal Case is Entitled to a Peremptory Strike Without Showing Prejudice	10
A. Defendants' Counsel Exercised Due Diligence	12
B. Defendants Should Not Be Required to Show Prejudice Where A Peremptorily Struck Venireman Was Seated on the Jury	16

Page

Argument II 19
Because of the Importance of the Constitutional Right to a Fair Trial, This Court Should Decide Whether a Defendant in a Criminal Case is Entitled to a New Trial Where the Government Failed to Object to Defendants' Motion for New Trial at the Time the Motion was Made and Granted by the Court.

Appendix

Certificate of Service

AUTHORITIES CITED

Cases

	Page
Ascosta v. State, 522 S.W.2d 528 (Tex. 1975)	17
Professional Assoc. of College Educators v. El Paso Comm. College Dist., 730 F.2d 258 (5th Cir. 1984)	21
State v. Thompson, 206 P.2d 1237 (Ariz. 1945)	18
Swain v. Alabama, 380 U.S. 202	11,12
U.S. v. Anderson, 741 F.2d 201 (5th Cir. 1973)	20
U.S. v. Angelos, 763 F.2d 859 (7th Cir. 1985)	22
U.S. v. Cole, 796 F.2d 380 (11th Cir. 1986)	12,13,16
U.S. v. Gutierrez, 560 F.2d 195 (5th Cir. 1977)	19,20
U.S. v. Kimberline, 781 F.2d 1247 (7th Cir. 1985)	22
U.S. v. Lovesque, 681 F.2d 75 (1st Cir. 1982)	17
U.S. v. Ricks, 776 F.2d 455 (4th Cir. 1985)	11,12
U.S. v. Smith, 436 F.2d 787 (5th Cir. 1971)	20

Other Authorities

	Page
U.S. Constitution Article VI	11
Federal Rules of Criminal Procedure, Rule 51 .pa	2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

NO.

NICODEAN MARK BILECKI,
EDNA MAE BILECKI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, dated June 23, 1989, affirming convictions in the United States District Court for the Southern District of Texas, Houston Division.

OPINIONS BELOW

This case was originally tried before the United States Magistrate. The Magistrate granted Defendants' Motion for New Trial after the jury was polled. Government appealed to the District Court for the Southern District of Texas, Houston Division. The Opinion of the District Court, JUDGE CARL BUE, is included in the Appendix. (App. D.)

JURISDICTION OF THE COURT

Petitioners appealed their conviction from the United States District Court for the Southern District of Texas, Houston Division, to the United States Court of Appeals for the Fifth Circuit. On June 23, 1989, the Fifth Circuit filed its judgment affirming conviction of Petitioners. (App. B.)

Petitioners' timely Motion for Rehearing was denied on July 27, 1989. (App. A.)

Jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and the district wherein the crime shall have been committed. . . .

STATEMENT OF THE CASE

A. Procedural History

Defendants were charged by Information with willful failure to file federal income tax returns for the calendar tax years 1981, 1982 and 1983, in violation of 26 U.S.C. Sec. 7203.

In addition, Defendant NICODEAN MARK BILECKI was charged with one count of filing a false W-4 Form, in violation of 26 U.S.C. Sec. 7205. The Information was filed on July 5, 1986.

Defendants were tried on September 15-18, 1986, before a jury in the United States District Court for the Southern District of Texas, Houston Division, United States Magistrate KAREN BROWN presiding.

On September 18, 1986, the jury returned a verdict of guilty on all seven counts. The court accepted and signed the jury verdict on September 18, 1986.

After hearing the verdict on the 18th, Defendants moved for a mistrial on the grounds that one of the jurors returning the verdict was inadvertantly seated after he had been stricken by

peremptory challenge of Defendants. Without any objection from the Government, the court granted the motion for a mistrial.

On September 22, 1986, the Government moved for "reconsideration" of the order granting a new trial and requested reinstatement of the jury verdict, claiming Defendants' waiver of the panel. On October 2, 1986, the court denied Government's motion and the Government timely appealed to the District Court.

On March 2, 1987, District Judge CARL O. BUE, JR. reversed the order of Magistrate KAREN BROWN and reinstated the jury verdict of September 18, 1986, finding waiver by the defense. The District Court failed to address the seminal issue of Defendants' response to the Government's Appeal, to wit:

that the Government had waived Defendants' alleged waiver. Defendants' Motion for Reconsideration on this point was denied by the District Court on April 3, 1987.

The case was remanded to Magistrate BROWN for reinstatement of the jury verdict of September 18, 1986. Magistrate BROWN'S Judgment and Probation/Committment Order was filed on July 9, 1987.

Defendant EDNA MAE BILECKI was sentenced to five years probation and fined One Hundred Ninety Dollars and Ninety-Two Cents ($190.92). Defendant NICODEAN MARK BILECKI was sentenced to one year imprisonment as to Count I, one day as to Count II, to run consecutive to the period of incarceration ordered as to Count I, and five years probation as to Counts

III and IV. Defendants remain free on their own recognizance.

Defendants timely appealed the Judgment and Probation/Committment Order to the United States District Court for the Southern District of Texas, Houston Division. The parties agreed there were no issues not already presented to the court by way of the Government's appeal prior to sentencing.

On the 13th day of September, 1988 United States District Judge KENNETH M. HOYT affirmed the judgment and probation/committment order of Magistrate BROWN. Defendants timely appealed Judge HOYT'S order.

On September 19, 1988, Magistrate KAREN BROWN reduced the sentence of Defendant NICODEAN MARK BILECKI to five years probation. On June 23,

1989, this case was considered by the Appellate Panel of the Fifth Circuit Court of Appeals, consisting of Circuit Judges BROWN, WILLIAMS and JOLLY. On June 23, 1989, the Panel, in a two-to-one vote, Circuit Judge WILLIAMS dissenting, affirmed the convictions.

Appellants filed a timely Petition for Rehearing, which rehearing was denied by Order of the Fifth Circuit Court of Appeals dated July 27, 1989.

B. Facts

Petitioners were tried before a jury, with a magistrate presiding. On September 18, 1986, the jury returned a verdict of guilty. When the jury was polled, it became apparent that an error had occurred. One member of the jury, MR. HOLT, had been peremptorily struck by the defense, but had taken a seat in the jury box in place of one of

the proper jurors, MS. VASQUEZ, and had sat through the four-day trial.

The mistake occurred when, during the seating of the jury, the deputy read the list of jurors out loud, excluding members who had been struck peremptorily. BILECKIS' counsel followed along. The error occurred when a MR. HOLT, who properly had been struck, went into the jury box in place of MS. VASQUEZ when her name was called by the court as "MR. VASQUEZ." Not only did the court refer to MS. VASQUEZ as a "MR. VASQUEZ," but also MS. VASQUEZ'S first name is "LUPE." After the name was called off incorrectly by the court and no one responded, counsel saw MR. HOLT take a place in the box.

Immediately after the jury was polled, defense counsel realized that a juror who had been peremptorily struck

was seated on the jury. Defense counsel brought the mistake to the attention of the court. The jury was dismissed and an off-the-record conference was held in chambers. Back on the record, the defense moved for a new trial, the government did not object, and the magistrate granted the motion. The court made a specific finding that the error was no fault of anyone including defense counsel.

On September 22, the government moved for reconsideration, arguing that the defense had waived any objection to the inadvertant seating of the stricken venireman.

ARGUMENT FOR GRANTING WRIT OF CERTIORARI

ARGUMENT I

BECAUSE OF THE IMPORTANCE OF THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL, THIS COURT SHOULD DECIDE WHETHER A DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO A PEREMPTORY STRIKE WITHOUT SHOWING

PREJUDICE.

This case presents the Court with a unique opportunity to preserve the sanctity of the jury selection system. United States Constitution, Article VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

An integral part of the process for securing an impartial jury is the defendant's right to peremptory challenge. Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965); see also, U.S. v. Ricks, 776 F. 2d 455 (4th Cir. 1985). It is Petitioners' position that the majority opinion improperly holds that the discovery of an improperly seated venireman after rendering of verdict is a per se waiver of any objection to seating of the improper venireman.

Moreover, once the majority found waiver of objection, it improperly applied the plain error rule to determine whether Defendants were prejudiced by the seating of an improper venireman.

A. Defendants' Counsel Exercised Due Diligence

The right of peremptory challenge is one of the most important rights of the accused. Denial or impairment of the right is reversable error. Swain, supra; see also U.S. v. Ricks, supra.

The majority panel, relying on U.S. v. Cole, 796 F.2d 380 (11th Cir. 1986), found that defense counsel had failed to object to the improper seating of a peremptorily struck venireman. The majority's opinion held that failure to object to an improper juror prior to verdict was a waiver of

any objection to the jury panel.

In Cole, supra, the court held that the seating of a juror who had been peremptorily challenged did not warrant reversal of conviction for reason that defendant's attorneys failed to exercise due diligence in discovering the seating of the improper juror. In Cole, a juror who had been peremptorily struck by the defense took a place in the jury box. The trial continued and a verdict of guilty was returned by the jury. The jury was subsequently polled by the court. However, defense attorney did not discover the improper juror even after polling the jury. Id., at 381.

The test in Cole is whether the defendant had exercised sufficient due diligence to perceive the error and call it to the court's attention in a

timely fashion. Id., at 381. If the defendant has not exercised such due diligence, prejudice must be shown to obtain a new trial. Id.

In the case at bar, the majority clearly ignored the issue of due diligence. Rather, the majority held that failure to object prior to verdict is a waiver of any objection to the jury panel.

Circuit Judge WILLIAMS' well-reasoned dissent points out that the proper test for determining waiver is whether counsel exercised due diligence in determining whether the improper venireman was seated. A per se rule ignores the facts in a particular case. Furthermore, JUDGE WILLIAMS correctly points out a requirement that Defendant show that he was prejudiced by the seating of a peremptorily struck

venireman "defeats the very nature of the peremptory strike right."

It is clear from the facts in the instant case that defense counsel did exercise due diligence and call the court's attention to the improper juror in a timely fashion. During the seating of the jury, the deputy read the list aloud, excluding the members who had been peremptorily struck. Counsel for defendant followed along as the deputy read the names. The error occurred when MR. HOLT, who had been peremptorily struck, went into the jury box in place of a MS. VASQUEZ when her name was called by the court as "MR. VASQUEZ." As Judge WILLIAMS points out, absent "a non-requisite memory for names and faces, counsel had no reason to suspect that the wrong person was in the box or that 'MR. VASQUEZ' was

supposed to be a female." See Judge WILLIAMS' Dissent in Decision of Panel, page 3.

Moreover, the trial court made a specific finding that the error occurred through no fault of anyone. Such finding means that there was no lack of diligence on the part of defense counsel.

The majority's opinion would make the failure to discover an improper juror prior to verdict, a per se waiver of any objection to the seating of the improper juror. The Cole court did not intend such an outcome.

B. **Defendants Should Not be Required to Show Prejudice Where a Peremptorily Struck Venireman Was Seated on the Jury**

The majority panel in the BILECKI case relied on a line of cases for the proposition that the seating of an improper juror who had been

peremptorily challenged, without objection, must prejudice defendant's right to a fair trial in order to warrant reversal. See Ascosta v. State, 522 S.W.2d 528 (Tex. Crim. App. 1975); U.S. v. Levesque, 681 F.2d 75 (1st Cir. 1982). The majority's reliance on Acosta and Levesque is misplaced.

In Ascosta, supra, the clerk called the precise and correct name of the juror who had been challenged, and no objection was raised. Defense counsel in Ascosta did not exercise due diligence. Id.

In Levesque, a second alternate juror was seated instead of the first alternate juror. Both jurors were qualified and neither were the object of peremptory challenge.

Conversely, in State v. Thompson,

68 Ariz. 386, 206 P.2d 1237, 1038 (1949), the court held that no showing of prejudice was required for the court to grant a new trial once it was determined that at least one juror had been peremptorily struck. The court noted that the peremptory challenge "is an arbitrary and capricious species of challenge to a certain number of jurors without showing any cause . . . . It is not essential to such a challenge that any bias or prejudice on the part of the juror be shown . . . . Defendant's statutory right to challenge . . . peremptorily is a right of rejection, not of selection." Id., at 1039.

The right to peremptory challenge is a fundamental right securing a fair trial for a defendant. Defense counsel is given a right to strike a certain

number of jurors, regardless of their legal qualifications to serve as jurors. There is no requirement that defense counsel strike the juror for bias, prejudice or any other reason. By requiring defense counsel to show prejudice, the majority panel undermines the very justification for peremptory challenge.

ARGUMENT II

BECAUSE OF THE IMPORTANCE OF THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL, THIS COURT SHOULD DECIDE WHETHER A DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO A NEW TRIAL WHERE THE GOVERNMENT FAILED TO OBJECT TO DEFENDANT'S MOTION FOR NEW TRIAL AT THE TIME THE MOTION WAS MADE AND GRANTED BY THE COURT.

The Federal Rules of Criminal Procedure, Rule 51, recognizes that, where objections are not made to orders or rulings of the court, there is a waiver of any objection to that ruling. See also U.S. v. Gutierrez, 560 F.2d

195 (5th Cir. 1977) (affirming conviction for possession of marijuana; defendant argued officer was not an expert on odor of marijuana and, thus, his testimony should not have been admitted; court held issue waived by failing to object at trial); U.S. v. Anderson, 741 F.2d 201 (5th Cir. 1973) (affirming conviction under Mann Act; defendant argued District Court did not give him enough time to review Jenks Act statement; at trial, counsel indicated he needed more time, but District Court said he had enough time; Court of Appeals held issue waived because defense counsel did not object or ask for recess); U.S. v. Smith, 436 F.2d 787 (5th Cir. 1971) (affirming conviction for passing forged money orders; defendant requested subpoenas for witnesses, some of whom were in

prison; court ordered government to interview witnesses prior to issuance of subpoena; defendant argued court violated Rule 17(b) in failing to give him ex parte hearing on subpoenas; Court of Appeals held issue waived because defense counsel failed to object to court's order).

In Professional Association of College Educators v. El Paso Community College District, 730 F.2d 258 (5th Cir. 1984), the court, upholding a partial verdict for plaintiffs, ruled that defense counsel had waived his right to object that the court did not give defendant enough time to present its defense. Defense counsel argued that he intended to call other witnesses in order to support defendant's position. The court held that the issue was waived, as defense

counsel made no objection and never informed the District Court that he wanted to call other witnesses until after an adverse verdict had been rendered. See also U.S. vs. Kimberlin, 781 F.2d 1247, 1252 (7th Cir. 1985) (government waived its "waiver defense" where the government waited until oral argument to contend that defendant ha. waived his duplicity challenge by failing to raise it before this time); and U.S. v. Angelos, 763 F.2d 859 (7th Cir. 1985) (post-conviction relief is waived by failing to raise issues on direct appeal).

In the case at bar, Government failed to object to Defendants' motion for a new trial. The court granted the motion for a new trial. Only after adverse ruling from the court did the government raise its objections through

motion for reconsideration. Under the facts and circumstances of this case, the government clearly waived its objection to Defendants' waiver of the jury panel.

CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse the Judgment entered herein by the United States Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED this 27th day of September, 1989.

MacPHERSON & McCARVILLE, P.A.

By _____

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APPENDIX A

PRO FORMA ORDER

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2960

D.C. Docket No. CR-H-86-00178-01

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NICODEAN MARK BILECKI and
EDNA MAE BILECKI,

Defendants-Appellants:

Appeal from the United States District Court for the Southern District of Texas

BEFORE: BROWN, WILLIAMS and E. GRADY JOLLY, Circuit Judges

ORDER

Upon consideration of the Petition for Rehearing En Banc, and treating the

Petition for Rehearing En Banc as a Petition for Rehearing, no one having requested the poll of the Court,

IT IS NOW ORDERED that the Petition for Rehearing is denied.

July 27, 1989.

_____

United States Circuit Court Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2960

D.C. Docket No. CR-H-86-00178-01

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NICODEAN MARK BILECKI,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

BEFORE: BROWN, WILLIAMS and E. GRADY JOLLY, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is

now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

June 23, 1989

WILLIAMS, Circuit Judge, dissenting.

ISSUED AS MANDATE: August 16, 1989

APPENDIX C

IN THE UNTIED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 88-2960

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NICODEAN MARK BILECKI and
EDNA MAE BILECKI,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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(June 23, 1989)

BEFORE: BROWN, WILLIAMS and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this case, the defendants challenge the district court's refusal to grant a new trial after it was discovered that a peremptorily

challenged venireman accidentally served in the place of a proper member of the jury. We affirm.

I

Nicodean Mark Bilecki and Edna Mae Bilecki were charged with willful failure to file federal income tax returns. Nicodean Mark Bilecki was also charged with filing a false W-4 form. They were tried before a jury, with a magistrate presiding. On September 18, 1986, the jury returned a verdict of guilty. When the jury was polled, it became apparent that an error had occurred. One member of the jury, Mr. Holt, had been peremptorily struck by the defense, but had taken a seat in the jury box in place of one of the proper jurors, Ms. Vasquez, and had sat through the four-day trial. When

the mistake was discovered, the jury was dismissed and an off-the-record conference was held in chambers. Back on the record, the defense moved for a new trial, the government did not object, and the magistrate granted the motion.

On September 22, the government moved for reconsideration, arguing that the defense had waived any objection to the inadvertent seating of the stricken venireman, and requested reinstatement of the jury verdict. The magistrate denied the motion. On appeal, however, the district judge reversed the order for a new trial, and ordered reinstatement of the verdict. The district court then denied the defendants' motion to reconsider its order. After reinstatment of the verdict and sentencing, the defendants

now appeal the issue to this court.

II

The ultimate question of this case is whether, after a guilty verdict in a criminal trial, the discovery of the inadvertent seating on the jury of a venireman peremptorily challenged by the defense is grounds for a new trial. The district court, in reversing the magistrate's decision to grant a new trial, found that there were insufficient grounds for a new trial. Generally, we review the grant or denial of a new trial only for abuse of discretion. In this case, however, the question is, more precisely, whether the district court utilized the proper legal standard in its exercise of discretion. The district court relied on United States v. Cole, 796 F.2d 380 (11th Cir. 1986). In Cole, as in the

instant case, a peremptorily challenged juror inadvertently took the place of one of the proper jurors, and the mistake was not discovered until after the jury returned a guilty verdict. Id. at 380-81. The Eleventh Circuit rejected the defendant's argument that the error entitled him to a new trial, and adopted a waiver rule: when the defense fails to notice and object to the inadvertent seating of a peremptorily challenged juror until after a verdict is reached, to obtain a new trial, prejudice must be shown. Id. at 381-82.

The court in Cole tied its holding to Texas cases applying such a rule. Id. at 381 (citing Acosta v. State, 522 S.W.2d 528 (Tex. Crim. App. 1975) and Anderson v. State, 142 Tex. Crim. R. 384, 154 S.W.2d 482 (1941)). The

Eleventh Circuit also found support in United States v. Levesque, 681 F.2d 75 (1st Cir. 1982). Id. In Levesque, a second alternate was accidentally seated on the jury; in the absence of a timely objection or an impact on substantial rights, the First Circuit found no cause for reversal. 681 F.2d at 80-81. The court in Cole declined to follow two other states that had granted new trials without a showing of prejudice when challenged jurors accidentally served. Id. at 381 (citing State v. Thompson, 68 Ariz. 386, 206 P.2d 1037 (1949), and Sherman v. State, 2 Ga. App. 148, 58 S.E. 393 (1907)).

We approve of the district court's application of Cole to the facts of this case. As noted in Levesque, 681 F.2d at 80, this approach is firmly grounded in Fed. R. Crim. P. 51 and 52.

Rule 51 preserves the general requirement that objections be timely so long as an opportunity to object exists. In this case, the proper time to object was when the jury was seated; at that time, the error could have easily have been corrected. We recognize that in this situation the contemporaneous objection rule places the burden on the lawyer to double-check the administrative action of the court in seating the jury. We also recognize that lawyers cannot ordinarily be expected to memorize instantaneously the faces of persons chosen to be on the jury as well as those excused. Nevertheless, it is the lawyers who make the peremptory challenges, and it is the parties they represent who are supposed to benefit from those challenges; thus, the

lawyers are in the best position to notice a mistake in time to correct it. For example, defense counsel here did notice, and did call to the clerk's attention, that the jurors were not taking their seats in the order called. Counsel should not then have disregarded his confusion; in this circumstance especially he should have followed through and asked for verification that the proper persons were seated. By foregoing that opportunity, counsel lost the chance to remedy the problem at minimal cost.

Since no timely objection was raised, we turn to Rule 52(b) which provides that courts may notice "plain errors or defects affecting substantial rights" even when no timely objection is made. Plain errors are those that "should have been apparent to the trial

judge without objection, or that strike at the fundamental fairness, honesty, or public reputation of the trial." United States v. Percy, 651 F.2d 268, 273 (5th Cir. 1981). The inadvertent seating of Mr. Holt in place of Ms. Vasquez was not plain error. Mr. Holt was plainly qualified to serve as a juror. There was no basis to challenge merely because he had been a special deputy sheriff twenty-five years earlier, even though Mr. Holt stated that he would not give law enforcement officials more credibility as witnesses. There is no basis to suppose that Mr. Holt was biased against the defendants or their case; nor is there any basis to suppose that he favored the prosecution. Mr. Holt's participation on the jury did not affect the fundamental fairness,

honesty, or public reputation of the trial, and therefore did not constitute plain error.

In reviewing for plain error, we assimilate the prejudice element of Cole and the other cases. Cole does not indicate what prejudice would be sufficient to warrant a new trial, or how such prejudice could be shown. The defendants argue that, in reality, there is no way to show prejudice since, if a juror could have been shown to be improperly biased, that juror could have been challenged for cause. Nevertheless, we have no need to elaborate on prejudice as a possible justification for a new trial because the function of the prejudice element of the standard state in Cole is adequately served by the plain error analysis above. In other words, there

may be a case where the participation of a peremptorily challenged juror so undermines the fairness of a trial that it constitutes plain error and entitles a defendant to a new trial even in the absence of a timely objection; this is simply not such a case.

III

We now return to a preliminary matter. The defendants argued below and continue to assert on appeal that the government waived its objection to a new trial by not opposing the motion when it was made. We see no reason why the government's failure initially to oppose a new trial justifies our reversing the district court's action. The government filed a timely motion for reconsideration in which it presented its reasons why a new trial was not necessary. The question then is

whether this motion satisfied the contemporaneous objection requirement of Rule 51. "This salutory rule has its roots in obvious considerations of finality of the criminal trial process of judicial efficiency, and of avoiding trials by ambush." Perez, 651 F.2d at 273. The motion for reconsideration adequately served the purpose of the rule because it gave the court the opportunity to correct itself before any waste of time or resources. Furthermore, the government gained nothing by delaying its opposition to the new trial. It is also significant that neither the magistrate, who declined to alter her original decision to grant a new trial, nor the district judge, who reversed that decision, gave credit to the defendants' waiver argument. Since the district court

consciously and, as we have held above, properly addressed the underlying issue, we are in no position now to say that the government spoke up too late. Accordingly, we reject the defendants' argument that the government waived its objection based on the defendants' waiver of objection to the improper juror.

IV

By reversing the magistrate's order granting a new trial, the district court effectively denied the defendants' motion for new trial. We review the grant or denial of a new trial only for abuse of discretion. Having already held, above, that the district court applied the proper legal standard to the fact situation before it, we now further hold that the district court did not abuse its

discretion in reversing the magistrate's order for a new trial. The defendants' convictions are AFFIRMED.

JERRE S. WILLIAMS, dissenting:

I must dissent. The majority holds that the failure to make an objection to the improper seating of a juror who was peremptorily struck was untimely and amounted to a wavier of that strike. Further, no prejudice was shown. The majority rests its holding on United States v. Cole, 796 F.2d 380 (11th Cir. 1986). With all due respect Cole does not and should not control this case. The majority fails to address the test in Cole for a waiver to be found. The test as stated is that there must have been a lack of due diligence by counsel in the failure to object. The majority instead chooses to focus on the necessary finding of

prejudice once waiver is found.

The analysis by the majority fails both on the waiver of objection issue and on prejudice issue. Under the due diligence requirement of Cole, the Bileckis' attorney did not waive the right to object to the improper juror. Under the facts of this case, making the objection at the time the jury was polled was enough to preserve the objection. Thus, I would remand for a new trial on this basis alone. But further, the majority focuses upon a prejudice requirement that is not and should not be the law. Such a requirement in this situation defeats the policy behind peremptory challenges.

Due Diligence

In reaching the plain error rule, the majority ignores the test, as

stated in Cole, to decide if there has been a waiver of objection:

> . . . it is the duty of the parties to advise the court of any errors in seating of struck jurors before the jury is impaneled. If the defendant has not exercised sufficient diligence to perceive the error and call it to the court's attention in timely fashion, prejudice must be shown to obtain a new trial.

796 F.2d at 381 (emphasis added). Under the majority holding, the inquiry ended because counsel did not discover the error until the trial was over. The effect of this ruling is that defendants lost the right to their statutorily allotted number of peremptory strikes regardless of who was at fault in the error. Using a requirement of due diligence on the other hand prevents this all-or-nothing application. An attorney concededly cannot claim an absolute right to depend entirely on the court to seat

the jury properly. But he or she preserves all of the client's rights as long as due diligence is exercised, although there was a serious mistake in the seating of the juror.

Applying the due diligence test of Cole to our facts, I follow the trial judge (magistrate by consent of the parties) in finding due diligence on the part of the Bileckis' attorney, and thus the situation is readily distinguishable from Cole. When seating the jury, the deputy read the list out loud, excluding the members who had been struck peremptorily, while Bileckis' counsel followed along. Bileckis' counsel then by the court's words had no reason to suspect an improper juror. The error occurred when a Mr. Holt, who properly had been struck, went into the jury box in place

of a Ms. Vasquez when her name was called by the court as "Mr. Vasquez." Not only did the court refer to Vasquez as a "Mr. Vasquez," but also Mr. Vasquez' first name is "Lupe," a name that defense counsel could readily have assumed was a male's name. Counsel then was not put on notice. After the name was called off incorrectly by the court and no one responded, counsel saw Mr. Holt take a place in the box. Absent a non-requisite memory for names and faces counsel had no reason to suspect that the wrong person was in the box or that "Mr. Vasquez" was supposed to be a female. Even the majority opinion admits that we do not require the attorneys to memorize the faces of those chosen and those excused.

In Cole, the counsel had no like

excuse. Defense counsel should have become aware of the improper juror during the jury selection process or during the trial, but he did not. After each side made its peremptory strikes in Cole, the court read correctly the list of jurors to counsel to check for errors. A few minutes later the court again read aloud the list of selected jurors so that they could take their seats in the jury box. The court however this time mistakenly failed to call a Ms. Platt's name so that one of the jurors who had been peremptorily struck by defendant remained in the jury box--a Mr. Wiggs. Simply checking the names on the list as the court read them would have put counsel on notice that a mistake had been made.

Defense counsel in Cole explained

that he did not learn of the error because he was taking notes while the names were being called out. The court correctly found this excuse inadequate. It noted that the improper juror was the opposite sex of the correct juror so that even if defense counsel was distracted at the time of the roll call, he had four days of trial to realize that there was an extra man on the jury panel.[1] The court had grounds to find a lack of diligence and therefore a waiver.

A critical factor in this case, not present in Cole is that the trial judge made a specific factfinding that the error occurred through no fault of anyone, and this finding means there was a finding of no lack of diligence on the part of defense counsel. Further, while in both cases the error

was not brought to the court's attention until after the verdict was returned, Bileckis' counsel was the one who discovered the

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1 In the case before us, also a male was seated in the jury box in place of a female. The failure to detect the error is fully understandable, however, because contrary to Cole, the Vasquez name was called as a male. Further, Ms. Vasquez' first name if it was mentioned in court is commonly masculine as well as feminine.

error during polling, and he immediately informed the judge. The judge in Cole on the other hand had to inform the non-diligent counsel of the error after the jury was polled.

I must conclude that the Cole test of due diligence does not expose a lack of diligence by Bilecki's counsel in this case. Even though Bileckis' counsel took an active role in the process of jury selection, a venireman was misseated through an administrative mistake of the court with an uncalled person presuming to take a seat on the jury. Because the error was justifiably found by the trial judge to be through no fault of anyone, including defense counsel, the right to object was not waived.

Prejudice

The majority rests its holding on

a required showing of prejudcie under Cole once it is determined that the right to object is waived. 796 F.2d at 381. The majority, as well as the court in Cole, skirts the fundamental problem with this prejudice requirement. The majority disposes of any possible problems by stating that the plain error rule adequately addresses them. While that might be true in a situation in which the plain error rule typically has been applied, using it in the peremptory strike context defeats the very nature of the peremptory strike right.

Unlike the majority and Cole, I would not have prejudice as any part of the test. See State v. Thompson, 68 Ariz. 386, 206 P.2d 1237, 1038 (1949) (no showing of prejudice required for the court to grant a new trial once it

was determined that at least one juror had been peremptorily struck); Sherman v. State, 2 Ga. App. 148, 58 S.E. 393 (1907) (same). As the court explained in State v. Thompson:

> It should be remembered that a "peremptory challenge" is an arbitrary and capricious species of challenge to a certain number of jurors without showing any cause. . . . It is not essential to such a challenge that any bias or prejudice on the part of a juror be shown. . . . Defendant's statutory right to challenge . . . peremptorily is a right of rejection and not of selection.

206 P.2d at 1039 (citations omitted). While the court in Thompson was aware that reversal should not be mandated for technical errors, it was sensitive to the defendant's statutory right to peremptory strikes without having to show cause. Id., at 1040.

The authority relied upon by the majority and the district court is a slender reed. The Texas cases, of

course, are not controlling since procedure is at issue. In any event, the 1975 Texas case, Ascosta v. State, 522 S.W.2d 528 (Tex. Crim. App. 1975), involved the clerk calling the precise and correct name of a juror who had been challenged, and no objection was raised. The refusal of a new trial in that case was the correct decision. But the facts are critically different from the miscall in this case. Admittedly the earlier, 1941, Texas case is more nearly in point to this case but the issue was considered only casually.

The First Circuit case, Levesque, treated as analogous in the majority opinion, involved a minor error far removed from a challenged juror being seated. In that case a second alternative juror was seated instead of

the first alternative. Note that both were qualified jurors, neither had been made the object of a challenge. This casual error is remote, indeed, from the seating of a challenged juror by calling the wrong sex, with a challenged juror, perhaps eager to serve and perhaps even eager to convict, taking a seat in the jury box even though his name was never called.

When a defendant can show that a venireman is biased or prejudiced, that venireman will be struck for cause. The remaining veniremen are technically legally fit to serve. The peremptory challenge then gives counsel a further step in choosing the jury that will actually hear the case. The attorney is by law given the right to strike a fixed number of veniremen who although legally qualified, have the

personality, educational background, vocation, or any other factors the accused and counsel see as relevant to a possible bias or hostility to the client's case. Bileckis' counsel was entitled by law to strike Mr. Holt for any reason or for no reason at all. By requiring a showing of prejudice, the majority is reading a justification into a peremptory challenge when the challenge requires no justification.

The majority expresses concern as to a possible ramification if there is no required showing of prejudice. Defendants could be able to gamble on a favorable verdict, and only when the verdict is unfavorable raise the objection that the jury was improper. 796 F.2d at 381. The concern is valid, but it assumes the defendant knows of the error. The correct use of the

waiver rule however is a complete remedy for this concern. Where there is evidence that counsel knew of the error but failed to bring it to the court's attention until it was too late to correct the error, it can properly be said that the defendant knowingly and intentionally waived the right to object to the improper juror. Counsel clearly then would have failed to meet the due diligence requirement.

Under our facts, there is simply no evidence at all of any improper role played by Bileckis' counsel. The trial judge made a specific finding to the contrary which is not challenged in any way.

Conclusion

The trial judge correctly found that a properly challenged venireman took a seat on the jury that convicted

the Bileckis with no fault on the part of the Bileckis or their counsel. Simply because, reasonably lacking knowledge, Bileckis' counsel failed to object until after the verdict was returned did not amount to a waiver. No one in the courtroom knew of the error, except perhaps the juror who decided to sit on the jury althrough he was not called. Counsel used due diligence in the seating and selection of the jury panel. Further, prejudice was inherent in negating the peremptory challenge. The rights of the accuseds demand a new trial before a properly chosen jury in this criminal prosecution.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	
	)	CR. NO.
v.	)	H-86-178-S
	)	
NICODEAN MARK BILECKI	)	
EDNA MAE BILECKI	)	
	)	

ORDER

This is an appeal by the United States of America to the United States District Court for the Southern District of Texas pursuant to 18 United States Code, Sections 3402 and 3731 from an order entered by the United States Magistrate on October 2, 1986 denying the Government's Motion to Reconsider the Granting of a New Trial and Motion to Reinstate Jury Verdict.

I. Background

The Defendants in the instant action timely waived jury trial before

the United States District Court Judge and elected a jury trial before the United States Magistrate.

On September 15, 1986 the Court and the parties conducted voir dire in the instant action. At the close of voir dire, the Defendants' counsel, Donald MacPherson, moved for a shuffling and drawing of the jurors in a random order. The Court indicated that the procedure was not recognized in the District[1] and the request for shuffling was denied.[2]

When the Court reconvened, however, the Court informed the parties through the Courtroom Deputy that the Defendants' request for shuffling of the venire would be permitted.

The venire was re-numbered by a random draw by the Courtroom Deputy. The members of the venire were not

moved, and they kept their original number, only the order on the list from which the parties were to make their strikes was changed.

The Government then made its peremptory strikes, alternate jurors were selected, and the jury was empaneled and sworn. During the seating of the jury, Venireman #23, Ms. Lupe Vasquez, was called to serve on the panel, but she was not seated. Instead, Venireman #26, Mr. Olin Holt, was seated and sworn in with the rest of the jury. In fact, Mr. Holt had been stricken by the Defendants through a peremptory challenge.

The Defendants made no objection to the seating of Mr. Holt on the jury panel. The Court conducted a four-day jury trial resulting in guilty verdicts on all seven counts. When the jury was

polled, the mistake was uncovered. The Court accepted and signed the jury verdict on September 18, 1986.

The Court granted the Defendants' motion for new trial. On September 22, 1986, the Government moved for reconsideration of the grant of a new trial and requested reinstatement of the jury verdict. On October 2, 1986, the United States Magistrate denied the Government's motion for reconsideration.

Pursuant to 18 U.S.C. Sec. 3402, in all cases of conviction by a United States Magistrate an appeal of right should lie from the judgment of the magistrate to a judge of the district court in the district in which the offense was committed.[3] In the instant action the Government has appealed the magistrate's granting of a new trial

and the denial of its motion for reconsideration pursuant to 18 U.S.C. Sec. 3731.[4]

The Government contends that the Defendants waived any objection to the inadvertent seating of a peremptorily challenged juror. Moreover, the Government cites United States of America v. Cole, 796 F.2d 380 (11the Cir. 1986) for the proposition that absent a showing of prejudice, the defendant was not entitled to a new trial due to inadvertent seating of a peremptorily challenged juror.

In the Cole case, as in the instant action, the error occurred during the seating of the jury panel after the parties had exercised their peremptory challenges. The trial proceeded without any objection from counsel. The defendant in Cole claimed

that his right of peremptory challenge is a substantial right which was impaired by the court's error in seating a stricken juror.

The Eleventh Circuit in Cole recognized that although there are no federal decisions in the Fifth Circuit regarding this issue, Texas States Court hold that it is the duty of the parties to advise the court of any error in the seating of struck jurors before the jury is empaneled. 796 F.2d at 380. If the defendant has not exercised sufficient diligence to perceive the error and call it to the court's attention in timely fashion, prejudice must be shown to obtain a new trial. Id., citing Acosta v. State, 522 S.W.2d (Tex. Crim. App. 1975); Anderson v. State, 142 Tex. Crim. 384, 154 S.W. 2d 482 (1941). The Cole Court

also relied on the First Circuit decision in United States v. Levesque, 681 F.2d 75, 80-81 (1st Cir.), cert. denied, 459 U.S. 1089, 103 S.Ct. 574, 74 L.Ed.2d 936 (1982), where the person intended as the second alternate was accidentally seated on the jury. The court in Leversque ruled that in the absence of any suggestion of deliberate manipulation and in the further absence of any objection having been rendered by the defense, there was no showing of prejudice or impact of substantial rights as would be required for reversal of the conviction.

In Cole, the court reasoned that a contrary rule would permit a defendant to gamble on a favorable verdict and, if the verdict was unfavorable, later raise an improper jury claim. 796 F.2d at 381.

In the action at bar, the Court faces an almost identical situation to that in the Cole case. The record shows that the defense attorney did not object to the seating of Mr. Holt in place of Ms. Vasquez, and the jury was empaneled. The defense counsel had the opportunity to view the jury during four days of trial. After the verdict was rendered, the error was revealed upon a poll of the jury.

The Court finds that the Defendants waived any objection to the jury panel by failing to discover and to object to the inadvertent seating of the peremptorily challenged juror.

Therefore, the Court finds that the United States Magistrate erred in granting the Defendants a new trial and in the denial of the Government's motion for reconsideration.

Accordingly, the Court directs that the jury verdict entered on September 18, 1986 should be reinstated.

SIGNED AND ENTERED at Houston, Texas, on this the 22nd day of March, 1987.

Carl O. Bue
United States District Judge

1

Defendants' counsel, Donald MacPherson, told the United States Magistrate that he had tried over 40 criminal cases including one in the Southern District in Galveston and that he was afforded the opportunity to view the random drawing of the panel in all those cases. Defendants' Brief, Page 4.

2

Later off the record, Magistrate Brown corrected MacPherson and indicated that she was informed by Judge Gibson that random selection in front of the Defendants was not the procedure in his court.

3

18 U.S.C. Sec. 3402 provides:

In all cases of conviction by a United States magistrate an appeal of right shall lie from the judgment of the magistrate to a judge of the district court of the district in which the offense was committed.

The Supreme Court shall prescribe the rules of procedure and practice for the trial of cases before magistrates and for taking and hearing of appeals to the judges of district courts to the United States.

4

18 U.S.C. Sec. 3731 provides in pertinent part:

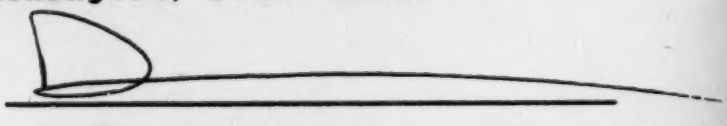
In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an

indictment or information or granting a new trial after verdict or judgment as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

CERTIFICATE OF SERVICE

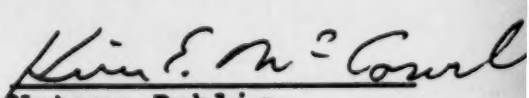
It is hereby certified that service of the foregoing has been made on the United States of America, by mailing copies of Petitioner's for Writ of Certiorari to the United States court of Appeals for the Fifth Circuit on this 26th day of September, 1989, by regular mail, postage prepaid, properly addressed to him as follows:

Solicitor General of the
United States of America
Department of Justice, Main Building
10th and Constitutional Avenue, N.W.
Washington, D.C. 20530



ACKNOWLEDGEMENT

On the 26th day of September, 1989, before me, a Notary Public, personally appeared Donald W. MacPherson, known to me or satisfactorily proven to be the person whose name is subscribed to this instrument and acknowledged that he executed the same.



Notary Public

My Commission Expires Dec. 31, 1989

Supreme Court, U.S.
FILED
OCT 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-548

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

NICODEAN MARK BILECKI AND
EDNA MAE BILECKI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners are entitled to a new trial because a venireperson against whom petitioners had exercised a peremptory challenge took the place of a proper member of the jury.

2. Whether petitioners are entitled to a new trial because the government did not object to their motion for a new trial at the time it was made but moved for reconsideration after it was granted.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Acosta v. *State*, 522 S.W.2d 528 (Tex. Crim. App. 1975) 6
Anderson v. *State*, 142 Tex. Crim. 384, 154 S.W.2d 482 (1941) 6
Ross v. *Oklahoma*, 108 S. Ct. 2273 (1988) 9
Sherman v. *State*, 2 Ga. App. 148, 58 S.E. 393 (1907) 6
State v. *Thompson*, 68 Ariz. 386, 206 P.2d 1037 (1949) 6
Swain v. *Alabama*, 380 U.S. 202 (1965) 9
United States v. *Atkinson*, 297 U.S. 157 (1936) .. 9
United States v. *Cole*, 796 F.2d 380 (11th Cir.), cert. denied, 479 U.S. 952 (1986) 3, 4, 6, 7, 8
United States v. *Frady*, 456 U.S. 152 (1982) 9
United States v. *Levesque*, 681 F.2d 75 (1st Cir.), cert. denied, 459 U.S. 1089 (1982) 6
United States v. *Young*, 470 U.S. 1 (1985) 9

Statutes and rules:

Internal Revenue Code (26 U.S.C.):
§ 7203 (Supp. V 1987) 2
§ 7205 (Supp. V 1987) 2
Fed. R. Crim. P.:
Rule 51 4
Rule 52 4

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 3-31, is reported at 876 F.2d 1128. The district court's order denying petitioners' motion for a new trial, Pet. App. 32-42, is unreported.

JURISDICTION

The judgment of the court of appeals, Pet. App. B, was entered on June 23, 1989. A petition for rehearing was denied on July 27, 1989. Pet. App. A. The petition for a writ of certiorari was filed on September 25, 1989. Pet. 1-23. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the United States District Court for the Southern District of Texas convicted petitioners Nicodean Mark Bilecki and Edna Mae Bilecki of willful failure to file federal income tax returns in violation of 26 U.S.C. 7203 (Supp. V 1987). The jury also convicted Nicodean Mark Bilecki of filing a false withholding certificate (Form W-4) in violation of 26 U.S.C. 7205 (Supp. V 1987). Both petitioners were sentenced to five years' supervised probation and 300 hours of community service. C.A. E.R. 8-10, 18-19.

1. Petitioners waived their right to a jury trial before a district judge in favor of a jury trial before a magistrate. The venire included Mr. Olin Holt and Ms. Lupe Vasquez. During voir dire, the prosecutor questioned Mr. Holt about his prior audit by the IRS. Later, petitioners' counsel questioned Mr. Holt about his prior service on a jury in a criminal case and about his work 25 years earlier as a special deputy sheriff. Petitioners' counsel asked Ms. Vasquez whether the fact that her son was a police officer would affect her impartiality. The magistrate did not discharge either Mr. Holt or Ms. Vasquez for cause. Gov't C.A. Br. 3-5.

After voir dire, petitioners' counsel peremptorily challenged Mr. Holt. Petitioners' counsel deliberated more than 15 minutes while exercising his peremptory challenges, and he rose frequently from his chair at the counsel table to view the venire. Gov't C.A. Br. 5; C.A. E.R. 31.

After petitioners' counsel exercised his peremptory challenges, the courtroom deputy called each member of the jury by name to take his or her place in the jury box. Instead of calling "Ms. Vásquez," however, the deputy called "Mr. Vasquez" to take a seat in the jury box. To compound the error, at that time Mr. Holt took a seat in the jury box. Pet. App. 4, 34. Although petitioners' counsel followed the process on a venire list that revealed that Ms. Vasquez's

spouse had a male name, "Herman," Gov't C.A. Br. Annex C, petitioners' counsel did not object either to the calling of "Mr. Vasquez" or to the seating of Mr. Holt. Moreover, during the seating or soon thereafter, petitioners' counsel told the courtroom deputy that the jurors were apparently not being seated in the order in which they were called, and that he found it difficult to match the jurors called with those who had taken seats in the jury box. Despite his difficulty, however, petitioners' counsel again made no objection and did not request a roll call. Gov't C.A. Br. 6. Mr. Holt sat through the four-day trial and took part in the jury's deliberations. Pet. App. 4, 34.

The parties and the magistrate discovered that Mr. Holt had taken the place of Ms. Vasquez when the jury was polled after returning its verdict. Pet. App. 4-5, 35. The magistrate then held an off-the-record conference in chambers, after which petitioners' counsel moved for a new trial. The government did not object to petitioners' new trial motion at that time, and the magistrate granted the motion. Pet. App. 4-5.

Four days later, the government filed a motion asking the magistrate to reconsider its decision to grant a new trial. The government argued that petitioners had waived any objection to the inadvertent seating of Mr. Holt and requested reinstatement of the verdict. Pet. App. 5, 35. The magistrate denied the government's motion, and the government appealed to a judge of the district court. Pet. App. 35-36.

2. The district judge held that the magistrate had erred in granting petitioners' motion for a new trial and denying the government's motion for reconsideration. Relying on *United States* v. *Cole*, 796 F. 2d 380 (11th Cir.), cert. denied, 479 U.S. 952 (1986), the district judge held that petitioners were entitled to a new trial only if they had exercised sufficient diligence to reveal the mistaken seating of Mr. Holt or had suffered prejudice as a result of the error. Pet. App.

36-39. In this case, the district judge held that petitioners had not exercised sufficient diligence because their counsel "did *not* object to the seating of Mr. Holt in place of Ms. Vasquez" at the time the jury was empaneled and failed to object before the jury rendered its verdict, even though petitioners' counsel "had the opportunity to view the jury during four days of trial." *Id.* at 39. In conclusion, the district judge found that petitioners had "waived any objection to the jury panel by failing to discover and to object to the inadvertent seating of the peremptorily challenged juror." *Ibid.* The district judge did not explicitly state whether the inadvertent seating of Mr. Holt had prejudiced the petitioners.

3. The court of appeals affirmed. It adopted the reasoning of the Eleventh Circuit's decision in *United States* v. *Cole*, 796 F.2d 380 (1986), and noted that *Cole*'s requirements of sufficient diligence and prejudice were "firmly grounded" in Fed. R. Crim. P. 51, which requires timely objections, and Fed. R. Crim. P. 52, which requires a court to disregard harmless errors. Pet. App. 8-9.

Like the district judge, the court of appeals found that petitioners' counsel had not exercised sufficient diligence in this case. The court recognized that "lawyers cannot ordinarily be expected to memorize instantaneously the faces of persons chosen to be on the jury as well as those excused." Pet. App. 9. At the same time, the court pointed out that "the lawyers are in the best position to notice a mistake in time to correct it." *Id.* at 9-10. In this case, the court remarked that petitioners' counsel "did notice, and did call to the clerk's attention, that the jurors were not taking their seats in the order called. Counsel should not then have disregarded his confusion; in this circumstance especially he should have followed through and asked for verification that the proper persons were seated." *Id.* at 10.

The court of appeals "assimilate[d] the prejudice element of *Cole*" when it considered and rejected petitioners' contention that Mr. Holt's service as a juror was a "plain error" that led to a miscarriage of justice. Pet. App. 12. The court concluded that (1) Mr. Holt was qualified to serve, (2) there was no basis to challenge Mr. Holt for cause, (3) there was no reason to suppose that Mr. Holt was biased against the defense or in favor of the prosecution, and (4) Mr. Holt's participation on the jury did not affect the fundamental fairness, honesty, or public reputation of the trial. *Id.* at 11-12.

Finally, the court of appeals held that the government did not waive its objection to a new trial by not responding to petitioners' motion for a new trial at the time it was made. The court determined that the government's prompt motion for reconsideration "adequately served the purpose of the [contemporaneous objection] rule because it gave the court the opportunity to correct itself before any waste of time or resources." Pet. App. 14. Moreover, unlike petitioners' failure to object to the seating of Mr. Holt on the jury, the government "gained nothing by delaying its opposition to the new trial." *Ibid.*

Judge Williams dissented. He argued that "[u]nder the due diligence requirement of *Cole*," petitioners' counsel "did not waive the right to object to the improper juror." Pet. App. 17. In addition, he maintained that requiring petitioners to demonstrate prejudice "in the peremptory strike context defeats the very nature of the peremptory strike right." *Id.* at 25.

ARGUMENT

1. Petitioners renew their contention that they are entitled to a new trial because a member of the venire against whom they had exercised a peremptory challenge took the place of a proper member of the jury. Pet. 10-19.

The inadvertent seating of a peremptorily challenged venireperson does not entitle a defendant to a new trial unless (1) defendant's counsel exercised sufficient diligence to detect the error and bring it to the trial court's attention, or (2) the defendant suffered prejudice. *United States* v. *Cole*, 796 F.2d at 381-382. Cf. *United States* v. *Levesque*, 681 F.2d 75, 80-81 (1st Cir.), cert. denied, 459 U.S. 1089 (1982) (inappropriate seating of alternate juror). Those prerequisites were not satisfied in this case.

a. To be entitled to a new trial a defendant must exercise sufficient diligence to bring the accidental seating of a peremptorily challenged juror to the attention of the trial judge before the jury returns its verdict. Every reported decision on this question has required due diligence. See *United States* v. *Cole*, 796 F.2d at 381 ("If the defendant has not exercised sufficient diligence to perceive the error and call it to the court's attention in timely fashion, prejudice must be shown to obtain a new trial." (citing *Acosta* v. *State*, 522 S.W.2d 528 (Tex. Crim. App. 1975), and *Anderson* v. *State*, 142 Tex. Crim. 384, 154 S.W.2d 482 (1941)); *Sherman* v. *State*, 2 Ga. App. 148, 152-153, 58 S.E. 393, 395 (1907) (ordering new trial because "this defendant, after having positively rejected the juror, was tried by him without fault on his part," and distinguishing a case denying a new trial on the ground that counsel had failed to exercise "due diligence"). See *State* v. *Thompson*, 68 Ariz. 386, 391, 206 P.2d 1037, 1040 (1949) (following *Sherman* v. *State*). In his dissent, Judge Williams also endorsed the requirement of due diligence because defense counsel cannot "depend entirely on the court to seat the jury properly," Pet. App. 18-19; accordingly, he applied the due diligence test of *Cole* to the facts of this case, *id.* at 19. Even petitioners concede that they must satisfy the *Cole* diligence test before they are entitled to a new trial. Pet. 12-16.

Strong policy reasons underlie the requirement that defense counsel exercise diligence in verifying that the proper jury has been seated. To begin with, the diligence requirement prevents a defendant from gambling on a favorable jury verdict and later raising a claim of error if the verdict is unfavorable. See *United States* v. *Cole*, 796 F.2d at 381. Even in cases in which defense counsel's failure to make the objection is negligent rather than willful, the diligence requirement prevents unnecessary retrials and thereby conserves scarce judicial resources.

Because there is no dispute about the governing legal standard, the decision here turns on whether that standard was satisfied on the facts of this case. The question whether petitioners' counsel exercised sufficient diligence is therefore simply a factual issue that does not warrant this Court's review.

First, although petitioners' counsel claimed in the court of appeals that he "was not familiar with all the [venirepersons'] faces for lack of ability to study the faces," Pet. C.A. Br. 6, petitioners' counsel deliberated 15 minutes while exercising his peremptory challenges, C.A. E.R. 31, and he rose frequently from his chair at the counsel table to view the members of the venire, Gov't C.A. Br. 5. Petitioners' counsel was particularly well positioned to become familiar with Mr. Holt and Ms. Vasquez because they were in the first two rows of jurors and petitioners' counsel stood directly in front of them as he questioned them. Gov't C.A. Br. 12, Annex B. Hence, petitioners' counsel should have noticed that Mr. Holt, a man, was taking the place of Ms. Vasquez, a woman. Second, the courtroom deputy's calling of "Mr. Vasquez" to the jury box should have put petitioners' counsel on notice that something was amiss, because the list on which petitioners' counsel was following the seating process indicated that venireperson Vasquez was a woman, not a man. Gov't C.A. Br. Annex C. Third, peti-

tioners' counsel should have requested a roll call to verify that the proper jurors had been seated when he became confused because the jurors were not taking their seats in the order they were called by the courtroom deputy. Pet. App. 10. Finally, whether or not defense counsel was "familiar with the jurors by name and face, he had ample opportunity to observe the jury composition during the trial and detect that there was an extra male juror." *United States* v. *Cole*, 796 F.2d at 382. Thus, petitioners had ample opportunity to object to Mr. Holt's service on the jury well before the jury returned its guilty verdict. The district judge and the court of appeals had a sound factual basis for finding that petitioners' counsel failed to exercise sufficient diligence.

Petitioners contend that the reviewing courts should have deferred to the magistrate's comment that "I find from all appearances that this is no fault of any party." C.A. E.R. 51. The magistrate's finding, however, did not address the proper issue. It was irrelevant under the *Cole* test whether petitioners' counsel caused the erroneous seating of Mr. Holt; instead, the proper inquiry was whether petitioners' counsel had been sufficiently diligent in discovering the error. And even if the magistrate's comment could be interpreted as addressing the due diligence issue, it was entitled to little weight when measured against the compelling indications that petitioners' counsel failed to exercise diligence in detecting the erroneous seating of the juror.

b. Mr. Holt's substitution for Ms. Vasquez on the jury in this case caused no prejudice to the petitioners. As the court of appeals determined, Mr. Holt was qualified to serve as a juror; there was no basis for a challenge for cause; there was no reason to suppose that Mr. Holt was biased for or against either party; and Mr. Holt's service did not affect the fundamental fairness of the trial. Pet. App. 11-12.

For those reasons, the unintentional seating of Mr. Holt as a juror was not plain error. This Court has held that "the

plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U.S. 152, 163 n. 14 (1982)). Such circumstances are those in which particularly egregious errors seriously affect the fairness, integrity, or public reputation of judicial proceedings. *United States* v. *Young*, 470 U.S. at 15; *United States* v. *Frady*, 456 U.S. at 163; *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). The error in this case clearly does not rise to that level.

Contrary to petitioners' submission, testing for prejudice or plain error where a party has not objected to the erroneous seating of a peremptorily challenged juror does not "undermine[ ] the very justification for peremptory challenge." Pet. 19. Of course, a peremptory challenge is exercised independent of any basis for a challenge for cause. For that reason, it is sometimes said that denial of the defendant's right to a peremptory challenge is reversible error without the need to show prejudice. *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965). But see *Ross* v. *Oklahoma*, 108 S. Ct. 2273, 2278-2279 (1988). In this case, however, petitioners have not been denied the right to a peremptory challenge: their counsel's lack of diligence allowed a peremptorily stricken venireperson to take a seat on the jury. In that circumstance, counsel's failure to object to the seating of a stricken venireperson is tantamount to a failure to exercise the right to make a peremptory challenge. It follows that the courts below, in declining to excuse petitioners' failure to object absent a showing of prejudice, did not act contrary to the rationale underlying peremptory challenges.

In any event, from the paucity of appellate decisions on this issue, it is clear that problems like the one that arose in this case occur very infrequently. The decision in this case will therefore not have a significant impact on the ad-

ministration of the criminal justice system. For that reason as well, this case does not merit review by this Court.

2. Petitioners also contend, Pet. 19-23, that the government waived any objection to petitioners' motion for a new trial by not objecting to it at the time it was made. As the court of appeals held, however, the government's motion for reconsideration was sufficiently timely to satisfy the contemporaneous-objection rule. Pet. App. 13-14. Not only did the government's motion give the trial court an opportunity to correct its error before any waste of time or resources had occurred, but the government gained nothing by failing to make an immediate objection to the new trial motion. *Id.* at 14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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